EDGAR L. CERDAY

IBLA 70-74 Decided June 21, 1976

Request for reconsideration of decision in Edgar L. Cerday, 12 IBLA 270 (1973).

Request granted; decision affirmed.

1. Indian Allotments on Public Domain: Classification-- Indian Allotments on Public Domain: Lands Subject to

In a decision on a request for reconsideration, the earlier decision holding that an application for an Indian allotment under section 4 of the General Allotment Act of February 8, 1887, as amended, 25 U.S.C. § 334 (1970), is properly reduced from 160 to 80 acres will be sustained where a Bureau of Land Management detailed report of field examination shows the land to be nonirrigable agricultural in character.

APPEARANCES: Robert L. Hartig, Esq., Cole, Hartig, Rhodes & Norman, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Edgar L. Cerday has filed a request for reconsideration and remand to the Bureau of Land Management (BLM) for further hearing of the decision issued by the Board of Land Appeals, entitled Edgar L. Cerday, 12 IBLA 270 (1973). The request for reconsideration stated the following contentions: that appellant had only recently obtained the services of an attorney, and also that the record in this case indicates that throughout the appeal process various procedural deficiencies were the crux of the problems raised while questions of evidentiary sufficiency were not offered to applicant. In addition, appellant asserts that the Board of Land Appeals, as well as considering the evidence in the field inspection report by BLM, should have also considered a field inspection by the Bureau of Indian Affairs (BIA), which expresses a contrary finding to the

BLM report. Appellant states that qualified members of the BIA Anchorage office made field inspections which support the BIA report. He contends that since the initial field inspection by BLM in 1967, a considerable change has been noted in the beneficial uses that could be made of the land and immediate area of the land involved in applicant's filing. He concludes that by affording him the opportunity to develop and present these evidentiary facts through a proper hearing, a serious oversight and injustice would be prevented. For the reasons stated below, the request for reconsideration is granted, and the Board's prior decision is affirmed.

In its decision of July 31, 1973, the Board of Land Appeals held that, as the filing fee was eliminated by regulation while the instant case was pending before the Department and as neither the rights of other parties nor the interests of the United States were adversely affected, appellant would be permitted to take advantage of the amendment to a regulation which was to his benefit. Therefore, the Board entertained the appeal and considered the substantive issues of the case. In determining the classification of the land in issue and, therefore, the number of acres that appellant would receive, the Board held that the only evidence before it was the BLM field inspection report and that the report was persuasive. Accordingly, it agreed with the conclusion of the report that the land covered in the application is nonirrigable agricultural in character and that appellant is entitled to only 80 acres. It has been appellant's position throughout that he should receive 160 acres because the land should be classified as nonirrigable grazing land.

After the request for reconsideration was received, Curtis V. McVee, State Director, BLM, of Anchorage, Alaska, was requested on August 20, 1975, to inform the Board whether as of 1975 there had been any change in the classification of the land involved or whether it should still be classified as "non-irrigable agricultural" in character. A copy of this request was sent to counsel for appellant.

Sometime after February 3, 1976, the Board received a supplemental field report dated October 29, 1975, covering the land sought by appellant. The supplemental report concludes the original field report is still correct and that the land covered in the application should remain classified as nonirrigable agricultural in character. A part of the supplemental report is the statement of Lyle D. Linnell, Soil Scientist, BLM Alaska State Office, who also examined the land in question on September 26, 1975. He states:

> It was determined by traversing a portion of the applicants claim in the vicinity of his cabin and studying the aerial photograph that at least 25 acres are non-irrigable agricultural land. * * * Principal

> crops grown in the area are small grains and hay, but all crops adapted can be grown. Cultivated fields of small grain and potatoes were observed in the vicinity of Mr. Cerday's claim in the field examination on September 26. Potatoes were being harvested and appeared to be a good yield. These crops are grown on soil similar to those on the land under Mr. application.

The supplemental field report lists that those present on September 26, 1975, when an examination was made of Indian allotment (A061555), were Dale Schoephorster, Soil Scientist from the Palmer Field Office of the Soil Conservation Service in Palmer, Alaska; Lyle Linnell, Soil Scientist from the Bureau of Land Management State Office in Anchorage; and Russ Sorensen, Natural Resource Specialist from the Bureau of Land Management District Office in Anchorage.

On March 12, 1976, the Board of Land Appeals received a telegram from appellant stating: "I respectfully request you delay your final decision on appeal until you receive letter from me mailing this week latest field examination report just received 8 March 1976 by me." On March 22, 1976, a letter was received by the Board from appellant in which he states that he disagrees with the findings of the field report. He says the lot number is wrong; it should be lot no. 3 and not lot no. 5; that the area covered in the new investigation was only the 80 acres already approved for appellant and he questions whether the investigation should not have covered the entire 160 acres. He suggests it would have been a courtesy if not a Bureau requirement to have appellant or a BIA realty officer present on the field examination. He states they were not informed of any planned trip into their area until after the fact and that was third-hand. He says, "It comes down to the fact that such a small amount of the 80 acres in question is suitable for cultivation and I submit, is that enough for subsistence and for the land to all be classified as nonirrigable agricultural lands? Or should it be classified as I have filed--as for grazing?"

The applicable regulation at 43 CFR 2530.0-8 provides:

> Land subject to allotment.
>
> (a) General. (1) The law provides that allotments may include not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.
>
> (2) Irrigable lands are those susceptible of successful irrigation at a reasonable cost from any known source of water supply; nonirrigable agricultural

lands are those upon which agricultural crops can be profitably raised without irrigation; grazing lands are those which can not be profitably devoted to any agricultural use other than grazing.

(3) An allotment may be allowed for coal and oil and gas lands, with reservation of the mineral contents to the United States.

Having duly considered the request for reconsideration and appellant's letter received on March 22, 1976, and having reviewed the record in its entirety in this case we find: The original BLM field examination of the land in issue, which took place in August 1967, involved the entire claim in the instant application. The finding in the original field report, dated January 8, 1969, that the land should be classified as nonirrigable agricultural in character was applicable to the entire claim of 160 acres. This Board, in its letter to the State Director of the Anchorage office, dated August 20, 1975, simply asked to be advised whether there was any change in the classification of the land involved, or whether it should still be classified as nonirrigable agricultural in character. Thereafter, the State Office determined what sort of supplemental investigation should be made of the land with respect to the correctness of its classification and did conduct such investigation. While the actual portion of the claim that was examined during the supplemental investigation may have been less than the 160 acres, nevertheless, the State Office has affirmed its position as set forth in its original field report that the land should remain classified as nonirrigable agricultural lands. The original report was a complete report and the original investigation covered the entire claim. It was stated in our earlier decision that the only real evidence before this Board as to the classification of the land is the original report based on the field examination conducted by the State Office of the Bureau of Land Management. Now that earlier report has been affirmed in a supplemental report dated as late as 1975. The BIA countervailing report was made by an animal husbandman and consists primarily of conclusory statements, in contradistinction to the BLM detailed reasoned analysis which embodied the findings of two soil scientists and a natural resource specialist.

In the circumstances herein, we are constrained to find that the land sought in the Native allotment application before us is classified as nonirrigable agricultural land, and on this basis the appellant is entitled to receive only 80 acres. We feel that no useful purpose would be served by a hearing and, therefore, deny appellant's request for one.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in Edgar L. Cerday, 12 IBLA 270 (1973), is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Frederick Fishman
Administrative Judge